

PROPOSED BOARD ORDER PREPARED BY DEP



STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
STATE HOUSE STATION 17
AUGUSTA, MAINE 04333

BOARD ORDER

IN THE MATTER OF:

HARRY LEIGHTON, JR.)	OIL STORAGE FACILITIES
AUBURN, MAINE)	ADMINISTRATIVE ORDER
REGISTRATION # 9671)	38 M.R.S.A. §§ 561 et seq.

Pursuant to the provisions of Maine's *Oil Storage Facilities and Ground Water Protection* law (Oil Law), 38 M.R.S.A. §§ 561 et seq., the Maine Board of Environmental Protection has considered the appeal of Harry Leighton, Jr., filed with the Board on December 17, 2009. Mr. Leighton has appealed the Order of the Department of Environmental Protection (hereinafter the DEP or Department) issued by the Commissioner on December 4, 2009. The DEP Order requires Mr. Leighton to cease deliveries of oil to underground oil storage tanks and cease operation of the tanks and associated piping unless and until he demonstrates compliance with Maine's Oil Law and related DEP rules.

Based upon testimony at the hearing held on March 18, 2010, and exhibits admitted at that hearing, the Board makes the following findings of fact, conclusions, and decision.

1. Harry Leighton, Jr. owns and operates underground storage tanks (USTs) for retail distribution of gasoline and for consumptive use at 968 Minot Avenue in Auburn, Maine, registration # 9671. The facility includes the following registered USTs:

Tank # 7: A five thousand [5,000] gallon UST containing premium gasoline;

Tank # 8: A five thousand [5,000] gallon UST containing plus gasoline;

Tank # 9: An eight thousand [8,000] gallon UST containing regular gasoline.

Tanks 7, 8 and 9 are constructed of double-walled, cathodically protected steel, and were installed on September 1, 1990.

The underground piping for all three tanks is single-walled and constructed of field coated cathodically protected steel.

2. Throughout the period addressed by this Order, Harry Leighton, Jr. was, and remains, subject to the *Oil Law*, 38 M.R.S.A. §§ 561 to 570-M, and the *Rules for Underground Oil Storage Facilities (the Rules)*, 06-096 CMR 691.

HARRY LEIGHTON, JR.
AUBURN, MAINE
REGISTRATION # 9671

2 OIL STORAGE FACILITY
) ADMINISTRATIVE ORDER
) 38 M.R.S.A. §§ 561 et seq

3. The *Oil Law*, 38 M.R.S.A. § 563(9)(A), states:

The owner of an underground oil storage facility shall submit annual inspection results to the department on or before July 1, 2003 and on or before July 1st annually thereafter. The results must be recorded on a form provided by the department and must include a certification statement, signed by an underground oil storage tank inspector or an underground oil storage tank installer certified by the Board of Underground Oil Tank Installers under Title 32, chapter 104-A that each tank and associated piping have been inspected and any deficiencies discovered during the inspection have been corrected. The owner shall submit the completed form to the department no more than 30 days after the date on which the inspection was completed.

4. The *Rules*, 06-096 CMR 691(5)(D)(20), require that the owner of an underground oil storage tank facility shall submit annual inspection results to the Department on or before July 1, 2003, and on or before July 1st annually thereafter, stating in relevant part:

The facility owner shall submit annual inspection results to the commissioner on or before July 1, 2003, and each July 1st thereafter. The inspection results must be recorded on a form provided by the commissioner and must include a certification statement, signed by an underground oil storage tank installer or inspector certified by the Maine Board of Underground Oil Storage Tank Installers. Such a certification must certify that the entire facility was inspected and any deficiencies discovered have been corrected. Inspection and correction records must also be maintained in accordance with section 5(D)(19). All corrections must be completed prior to the annual July 1st reporting deadline.

5. The *Oil Law*, 38 M.R.S.A. §§ 564 and 564(2-A)(C), state in relevant part:

The board shall adopt rules necessary to minimize, to the extent practicable, the potential for discharges of oil from underground oil storage facilities and tanks used to store motor fuel or used in the marketing and distribution of oil to others. These rules must ensure that requirements and standards governing facilities under this section assure that the State's program meets requirements under the United States Resource Conservation and Recovery Act, Subtitle I, as amended. These rules include the following requirements.

2-A Monitoring, maintenance and operating procedures for existing, new and replacement facilities and tanks. The board's rules must require:

- C. Voltage readings for cathodically protected systems by a cathodic protection tester 6 months after installation and annually thereafter.

HARRY LEIGHTON, JR.
AUBURN, MAINE
REGISTRATION # 9671

3 OIL STORAGE FACILITY
) ADMINISTRATIVE ORDER
) 38 M.R.S.A. §§ 561 et seq

6. The *Rules*, 06-096 CMR 691(5)(D)(4)(a and e), state in relevant part:

(4) Operation and Monitoring Requirements for Galvanic Cathodic Protection Systems

(a) All galvanic cathodic protection systems must be operated and maintained to continuously provide adequate corrosion protection to the underground metal components of the facility routinely storing or containing oil, and in a manner that ensures no leaks occur during the operational life of the facility. Adequate corrosion protection is indicated by a cathodic protection test reading of at least negative 0.85 volts. Steel composite tanks without secondary containment and continuous interstitial space monitoring must comply with this requirement.

(e) Repairs of a galvanic cathodic protection system must be completed by a Maine Certified Underground Oil Tank Installer within 180 days of a failed test.

7. Harry Leighton, Jr. has failed to operate and maintain galvanic cathodic protection systems in accordance with 38 M.R.S.A. 564(2-A)(c) and 06-096 CMR (5)(D)(4)(a) and (D)(4)(e). The last passing test of the cathodic protection of the tanks and piping was conducted on April 7, 2006. The cathodic protection of the tanks and piping was tested again on November 27, 2007 and December 12, 2007 with failing results for all three tanks and the associated piping. Failing cathodic protection means that the tanks or piping are not protected from corrosion, and are at risk of failure. Repairs of a galvanic cathodic protection system must be completed by a Maine Certified Underground Oil Tank Installer within 180 days of a failed test. Tanks or piping that are not protected from corrosion do not pass an annual inspection.

8. The *Rules*, 06-096 CMR 691(5)(D)(17)(a) and (f) state in relevant part,

(17) Repairs other than relining

(a) Repairs are allowed in accordance with this paragraph to tanks and piping constructed of fiberglass, cathodically protected steel and other noncorrosive materials approved by the commissioner.

(f) Tank and piping repairs are to be conducted in accordance with manufacturer specifications or in accordance with the National Fire Protection Association Standard 30, "Flammable and Combustible Liquids Code."

Because the piping was field coated, there are no "manufacturer specifications" which apply to repair of the piping. The National Fire Protection Association Standard 30 contains no provisions concerning repair of cathodic protection. The *Rules* 06-096 CMR

HARRY LEIGHTON, JR.
AUBURN, MAINE
REGISTRATION # 9671

4 OIL STORAGE FACILITY
) ADMINISTRATIVE ORDER
) 38 M.R.S.A. §§ 561 et seq

691 have prohibited the installation of field coated piping since 1991. Because there are no manufacturer's specifications or provision in NFPA standard 30, the piping can not be repaired and must be removed and replaced.

9. Harry Leighton, Jr. has failed to submit to the Department passing annual inspection results on or before July 1st for the years 2007, 2008 and 2009 that indicate each tank and associated piping have been inspected and any deficiencies discovered during the inspection have been corrected. The last passing annual inspection submitted for this facility was conducted on April 7, 2006. By failing to submit passing annual inspection results, Harry Leighton, Jr. has failed to comply with 38 M.R.S.A. § 563(9) and 06-096 CMR 691(5)(D)(20).
10. The Department issued a Notice of Violation (NOV) dated October 2007 to Harry Leighton, Jr. for failure to submit a passing 2007 annual inspection.
11. The Department issued a NOV dated September 2009 to Harry Leighton, Jr. for failure to submit a passing 2009 annual inspection.
12. The *Oil Law*, 38 M.R.S.A. § 565-A(1), states in relevant part:

[T]he commissioner may, after providing an owner or operator of an underground oil storage tank with a notice of violation for failure to comply with a requirement of this subchapter and after providing a reasonable opportunity for correction of the violation, issue an administrative order requiring the owner or operator of the underground oil storage tank that is the subject of the violation to cease deliveries of oil to the tank and to cease operation of the tank and associated piping until the violation has been corrected. The commissioner shall issue an administrative order to cease deliveries to or operation of an underground oil storage tank subject to section 564 upon determining that:

 - A. The tank is not equipped with the spill prevention, overfill protection, leak detection or corrosion protection measure required under section 564 and applicable department rules;
 - B. The tank is not being operated or maintained in compliance with section 564 and applicable department rules and the owner or operator has failed to gain compliance with the requirements within 30 days of being provided with a citation for or written notice of the violation; or
 - C. There is evidence of an ongoing release of product from the tank or facility at which the tank is located

13. The *Oil Law*, 38 M.R.S.A. § 565-A, states in relevant part:

HARRY LEIGHTON, JR.
AUBURN, MAINE
REGISTRATION # 9671

5 OIL STORAGE FACILITY
) ADMINISTRATIVE ORDER
) 38 M.R.S.A. §§ 561 et seq

4. Identification of tanks subject to delivery prohibition. Whenever the commissioner issues an administrative order under subsection 1, department staff shall affix a red tag to the fill pipe of the underground oil storage tank. The owner or operator may not allow the deposit of oil into the tank while a red tag is affixed to the fill pipe.

As used in this section, "red tag" means a tag, device or mechanism devised by the department for use in signifying that an underground oil storage tank is ineligible for product delivery. The tag must be red in color and must bear words clearly conveying that it is unlawful to deposit oil into the tank. The tag must be made of plastic or other durable, damage-resistant material and must be designed to be easily affixed to the tank fill pipe.

5. Prohibition. A person may not deposit oil into an underground oil storage tank that has a red tag affixed to the fill pipe or tamper with the tag except to remove it as authorized by the commissioner under subsection 6.
6. Return to service. A red tag affixed pursuant to this section may not be removed until an underground oil storage tank inspector or underground oil storage tank installer certifies in writing to the commissioner that the applicable violations have been corrected and the commissioner authorizes removal of the tag. The commissioner shall remove or authorize the removal of the tag as soon as practicable upon receipt of the certification. The commissioner may remove or authorize the removal of the tag absent confirmation that the violations have been corrected in emergency situations or when removal is determined to be in the best interest of the public.

14. The *Oil Law*, 38 M.R.S.A. § 565-A(3), provides for the appeal of an order issued pursuant to 38 M.R.S.A. § 565-A(1), as follows:

An administrative order under subsection 1 may be appealed to the board by filing a written petition within 5 working days after receipt of the order. Within 15 working days after receipt of the petition, the board shall hold a hearing on the matter. All witnesses at the hearing must be sworn. Within 7 working days after the hearing, the board shall make findings of fact and shall continue, revoke or modify the administrative order. The decision of the board may be appealed to the Superior Court in accordance with Title 5, chapter 375, subchapter 7.

15. On December 4, 2009 the Commissioner issued an administrative order pursuant to 38 M.R.S.A. § 565-A(1), requiring Harry Leighton, Jr. to comply with the Oil Law and the Rules within thirty (30) days or to cease deliveries of oil to the tanks and cease operation of the tanks and associated piping until the violations have been corrected.

HARRY LEIGHTON, JR.
AUBURN, MAINE
REGISTRATION # 9671

6 OIL STORAGE FACILITY
) ADMINISTRATIVE ORDER
) 38 M.R.S.A. §§ 561 et seq

16. On December 17, 2009 Harry Leighton, Jr. filed an appeal of the Order with the Board of Environmental Protection.
17. On January 6, 2010, Harry Leighton, Jr. and the Commissioner entered into an agreement to waive the time requirement of 38 M.R.S.A. § 565-A(3) for the Board to hold a hearing.. The Agreement stipulated that the Order was stayed until the Board issues a final decision on the appeal.
18. The Board held a hearing on the appeal on March 18, 2010.

THEREFORE, based upon the above findings of fact and conclusions, the Board UPHOLDS the DEP's Order and DENIES the appeal of Harry Leighton, Jr., and MODIFIES the DEP Order as follows:

Pursuant to 38 M.R.S.A. § 565-A(1), Harry Leighton, Jr. is hereby ordered to:

A. Immediately cease deliveries of oil to, and operation, of the USTs and associated piping located at the Leighton's Service Station facility in Auburn, Maine, identified in Paragraph 1 of this Order, unless and until:

Mr. Leighton submits to the Department a passing annual inspection for each tank, as required by 38 M.R.S.A. § 563(9)(A) and 06-096 CMR 691(5)(D)(20), certifying that the tanks and associated piping have been inspected by a Maine certified underground oil storage tank installer or inspector and any deficiencies discovered during the inspection have been corrected

B. Not remove or interfere with the red tag that the DEP will affix, pursuant to 38 M.R.S.A. § 565-A, to the fill pipe of the USTs identified in Paragraph 1 of this Order, except to remove the red tag when and if authorized to do so by DEP.

DONE AND DATED AT AUGUSTA, MAINE THIS ____ DAY OF MARCH, 2010.

BOARD OF ENVIRONMENTAL PROTECTION

BY: _____
Susan M. Lessard, Chair

HARRY LEIGHTON, JR.
AUBURN, MAINE
REGISTRATION # 9671

7 OIL STORAGE FACILITY
) ADMINISTRATIVE ORDER
) 38 M.R.S.A. §§ 561 et seq

NOTICE OF APPEAL RIGHTS

Pursuant to 38 M.R.S.A. § 565-A(3), the decision of the Board may be appealed to the Superior Court in accordance with Title 5, Chapter 375, subchapter 7 (5 M.R.S.A. § 11001 et seq.) Pursuant to 5 M.R.S.A. § 11002(3), the appeal must be filed with the Superior Court within 30 days after receipt of notice of the Board's decision, if the appeal is taken by a party to the proceeding of which review is sought.